9-65

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JUL 5 1973
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IN THE

Supreme Court of the United States

73-65

JEROME DALY — PETITIONER

VS.

N.T. WALDOR, COMMISSIONER OF HIGHWAYS OF MINNESOTA AND JOHN MC CARTHY, CLERK OF SUPREME COURT OF MINNESOTA AND STATE OF MINNESOTA, — RESPONDENTS

JEROME DALY
PETITIONER, PRO SE
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Supreme Court of the United States

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IN THE SUPREME COURT OF
THE UNITED STATES OF AMERICA

Jerome Daly, Petitioner,

vs.

N.T.Waldor,
Commissioner of Highways
of Minnesota and John
McCarthy, Clerk of Supreme
Court of Minnesota, and
State of Minnesota, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES TO REVIEW JUDGMENT ENTERED BY THE SUPREME COURT OF MINNESOTA ON JUNE 7, 1973.

To: The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States of America.

Your Petitioner, Jerome Daly, having been first duly sworn respectfully represents and Petitions the Supreme Court of the United States as follows:

I.
OFFICIAL REPORTS

The opinion was filed in the Supreme Court of Minnesota on May 18, 1973. It is attached hereto as an Appendix. It is cited in the official reports as
ON June 7, 1973, Judgment in favor of respondent was entered in the Supreme Court of Minnesota.

II.
JURISDICTION OF THE COURT

The grounds upon which the jurisdiction of the Court is invoked is as follows:

This is a Common Law Writ of Certiorari to seek review of the Judgment of a State Supreme Court. Jurisdiction is Conferred by Article 3 and Amendments 1, 4, 5, 6, 9, and 14 of the Constitution of the United States. Also jurisdiction is conferred pursuant to 28 U.S. Code Sec. 1651, 1254 and 1257.

III.
QUESTIONS PRESENTED FOR REVIEW

Petitioner brought a Declaratory Judgment Action in the State Courts of Minnesota to have the Minnesota Motor Vehicle Implied Consent Law declared unconstitutional upon the grounds, among others, that it constituted a planned warrantless search and seizure of his personal effects in violation of the 4th and 14th Amendments to the Constitution of the United States. The Statutes in question, Minnesota Statutes 169.123 is as follows:

169.123 Chemical tests for intoxication

Subdivision 1. Peace officer defined. For purposes of Laws 1961, Chapter 454, the term peace officer means a state highway patrol officer or full time police officer of any municipality, including towns having village powers under Minnesota Statutes, Section 368.01, or county having satisfactorily completed a prescribed course of instruction in a school for instruction of persons in law enforcement conducted by the University of Minnesota or a similar course considered equivalent by the commissioner of public safety.

Subdivision 2. Implied consent: conditions; election as to type of test. Any person who drives or operates a motor vehicle upon the public highways of this state shall be deemed to have given consent subject to the provisions of Laws 1961, Chapter 454, to a chemical test of his blood, breath, or urine for purpose of determining the alcoholic content of his blood.

The test shall be administered at the direction of a peace officer. The test may be administered when the officer has reasonable and probable grounds to believe that a person was driving or operating a motor vehicle while said person was under the influence of an alcoholic beverage, and one of the following conditions exist: (1) the said person has been lawfully placed under arrest for alleged commission of said described offense in violation of Minnesota Statutes, Section 169.121, or an ordinance in conformity therewith; or, (2) the person has been involved in a motor vehicle collision resulting in property damage, personal injury, or death. The test may also be administered when the officer has reason to believe that a person was driving or operating a motor vehicle in violation of Minnesota Statutes, Section 169.121 or an ordinance in conformity therewith and the person has either refused to take the preliminary screening test provided for by Minnesota Statutes, Section 161.121, Subdivision 1, or such preliminary screening test was administered and recorded a blood alcohol level of .10 percent or more by weight of alcohol. Any person may decline to take a direct blood test and elect to take either a breath, or urine test, whichever is available, in lieu thereof, and either a breath or urine test shall be made available to the arrested person who makes such an election. No action shall be taken against the person for declining to take a direct blood test unless either a breath, or urine test was available. At the time the peace officer requests such chemical test specimen, he shall inform the arrested person that his right to drive may be revoked or denied if he refuses to permit the test and that he has the right to have additional tests made by a person of his own choosing.

Subdivision 3. Manner of making test; additional tests. Only a physician, or a medical technician, or registered nurse acting at the request of a peace officer may withdraw blood for the purpose of determining the alcoholic content therein. This limitation shall not apply to the taking of a breath, or urine specimen. The person tested shall have the right to a physician, or a medical technician, or registered nurse, of his own choosing administer at the direction of a peace officer; provided, that the additional test specimen on behalf of said person be ob-

tained at the place where such person is in custody and at no expense to the state. Said person shall have the right to immediately communicate with his attorney, doctor or any other person in order to secure a physician, medical technician, or registered nurse, for the purpose of administering such tests or test; but this shall in no way delay the administering of the test at the direction of the peace officer. The failure or inability to obtain an additional test or tests by a person shall not preclude the admission in evidence of the test taken at the direction of a peace officer unless the additional test was prevented or denied by the peace officer. Upon the request of the person who is tested, full information concerning the test or tests taken at the direction of the peace officer shall be made available to him. The physician, medical technician or registered nurse drawing blood at the request of a peace officer for the purpose of determining alcoholic content shall in no manner be liable in any civil or criminal action except for negligence in drawing the blood. The person administering such test at the request and direction of such peace officer shall be fully trained in the administration and interpretation of such tests pursuant to standards promulgated by rule by the commissioner of highways.

Subdivision 4. Refusal to permit test; revocation of license. If a person under arrest refuses to permit chemical testing, none shall be given, but the commissioner of public safety, upon the receipt of a certificate of the peace officer that he had reasonable and probable grounds to believe the arrested person had been driving or operating a motor vehicle upon the public highways while under the influence of an alcoholic beverage, and that the person had refused to permit the test, shall revoke his license or permit to drive and any nonresident operating privilege for a period of six months. If the person is a resident without a license or permit to operate a motor vehicle in this state, the commissioner of public safety shall deny to the person the issuance of a license or permit for a period of six months after the date of the alleged violation, subject to review as hereinafter provided.

Subdivision 5. Notice of revocation or determination to deny; request for hearing. No revocation under subdivision 4 shall be made until the commissioner of public safety notifies the person by certified or registered mail of the intention to revoke and allows said person a 20 day period after the date of receiving said notice to request of the commissioner of public safety, in writing, a hearing as herein provided. If no request is filed within the 20 day period the commission of public safety may then issue an order of revocation. However if a request for hearing is filed, no revocation hereunder shall be made until final judicial determination resulting in an adverse decision to said person.

Subdivision 6. Hearing. The hearing shall be before a municipal judge, or probate judge if no municipal judge is available, learned in the law, in the county where the arrest occurred, unless there is agreement that the hearing may be held in some other county. The hearing shall be recorded and proceed as in a criminal matter, without the right of trial by jury, and its scope shall cover the issues of whether the peace officer had reasonable and probable grounds to believe the person was driving or operating a motor vehicle while under the influence of an alcoholic beverage; whether the person was lawfully placed under arrest; whether he refused to permit the test, and if he refused whether he had reasonable grounds for refusing to permit the test; and whether at the time of request for the test the peace officer informed the said person that his right to drive might be revoked or denied if he refused whether he had reasonable grounds for refusing to permit the test and of his right to have additional tests made by a person of his own choosing. The municipal court shall order either that the revocation or denial be rescinded or sustained and refer such order to the commissioner of public safety.

Subdivision 7. Review by district court. If the revocation or denial is sustained, the person whose license or permit to drive, or nonresident operating privilege has been revoked or denied, may within 20 days after notice of the determination by the commissioner of public safety file a petition for a hearing of the matter in the district court

in the county where the hearing pursuant to subdivision 6 was held unless there is agreement that the hearing may be held in some other county. The petition shall be filed with the clerk of the said court together with proof of service of a copy thereof on the commissioner of public safety. It shall be the duty of the court to set the matter for hearing on a day certain with reasonable notice thereof to the parties. The matter shall be heard de novo with a right of trial by jury.

Subdivision 8. Notice of action to other states. When it has been finally determined that a nonresident's privilege to operate a motor vehicle in this state has been revoked or denied, the commissioner of public safety shall give information in writing of the action taken to the official in charge of traffic control or public safety of the state of the person's residence and of any state in which he had a license.

Appellant also designated his friend Gordon Peterson to speak for him at the trial, which was not permitted at the trial and also was affirmed by the Supreme Court of Minnesota.

Therefore, the questions presented for review are as follows:

1. Does the Implied Consent Law violate the Bill of Rights and the 14th Amendment to the Constitution of the United States?

2. Does the implied consent law constitute a Bill of Attainder?

3. Can a State pass any law abridging the right of a citizen at his trial to peaceably assemble and Petition his government for a redress of grievances and to have his next of friend speak for him in the Courtroom?

4. Can the right of freedom of speech by arbitrarily limited in the Courts?

5. Can the legislature by implication waive the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures by legislative act under the guise of an ingeniously drawn implied consent law?

6. Can the legislature by implication waive a citizen's right to be free from self incrimination under the guise of an ingeniously drawn implied consent law?

7. Does an arresting officer have a duty under the law to take the arrested person before the nearest magistrate promptly?

8. Is a Driver's License a property right which cannot be deprived without due process of law?

9. Can the legislature pass a Bill of Attainder?

10. Can the legislative impose a penalty, whether automatically by operation of law or otherwise, by reason of the fact that the citizen declines to waive one or more of his constitutional rights?

11. Can the legislature pass an implied consent law which authorizes a "Planned, Warrantless Search and Seizure" by a police officer who is acting in an adversary capacity in searching out evidence for a criminal prosecution?

12. Can the legislature pass an implied consent law which deprives a citizen of the equal protection of the laws?

13. Can the legislature pass an implied consent law which deprives a citizen of his 4th, 5th, 9th and 14th Amendment rights to life, liberty and property without due process of law?

14. Can the legislature waive a citizen's Constitutional rights?

IV.
CONSTITUTIONAL PROVISIONS INVOLVED

Article I. "Congress shall make no law abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances."

Article IV. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Article V. "No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

Article VI. "In all criminal prosecutions the accused shall have the right to be informed of the nature and cause of the accusation, and to have the assistance of Counsel for his defense."

Article IX."The enumeration of the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

Article XIV. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 1 Sec. 10 provides:

"No State shall pass any Bill of Attainder."

V.
STATEMENT OF THE CASE

The procedural history is as follows:

1. March 13, 1970, Savage Police Officer I. R. Larson arrested appellant for the offense of driving under the influence.

2. Immediately after the arrest appellant demanded to be taken before the nearest magistrate.

3. Officer Larson advised appellant that he was taking him to Shakopee, 8 miles away, to be examined by a Doctor.

4. At about 9:30 pm, Officer Larson attempted to conduct a planned, warrantless search of appellant's blood, breath and urine.

5. On March 16, 1970, the Driver's License Officer, Department of Highways received a certificate of non-compliance on the part of appellant with 169.123 sub. 2.

6. On March 23, 1970, Notice was given to Plaintiff by certified mail that his license was suspended and that said suspension would take effect within 20 days unless appellant requested a hearing.

7. On April 13, 1970, Appellant sent Notice in writing that he objected to any suspension of his license without being accorded full due process of law.

8. On April 22, 1970, Appellee filed a petition with the Municipal Court of Shakopee pursuant to 169.123.

9. On January 14, 1971, a hearing was held before the Municipal Court of Shakopee pursuant to 169.123 where Appellant appeared and objected to the jurisdiction of the court.

10. On January 26, 1971, the Municipal Court of Shakopee issued an order sustaining the action already taken by the Commissioner of Highways in suspending the license.

11. On February 10, 1971, Appellant, Jerome Daly, commenced an action for Declaratory Judgment pursuant to law, MS 555 to have 169.123 declared unconstitutional and void and being in violation of the 1st, 4th, 5th, 6th, 9th and 14th Amendments to the Constitution of the United States.

12. Pre-trial Motions were made.

13. Trial by Court and Jury was had on December 8, 1971.

14. Motion for Judgment in favor of appellant was heard by the Court on January 3, 1972.

15. Judgment was entered on February 25, 1972.

16. Notice of Appeal from the Judgment was served and filed on May 21, 1972.

17. Petitioner by filing a written power of Attorney appointed Gordon Peterson to represent Petitioner at the trial.

18. Minnesota Supreme Court handed down its opinion on May 18, 1973.

19. Judgment was entered in the Minnesota Supreme Court on June 7, 1973.

VI.
ARGUMENT

Petitioner claims that the implied consent law, MSA 169.123 is unconstitutional and void upon the following grounds:

1. It establishes a planned warrantless search in violation of the 4th and 14th Amendments.

2. It makes the exercise of one constitutional right, freedom of travel, the waiver of other constitutional rights to wit: freedom of unreasonable searches and seizures, self incrimination, Counsel, and the equal protection of the laws for the indigent.

3. It imposes a penalty if the citizen wishes to exercise, and not waive, his constitutional rights, all the while recognizing the right of the citizen not to waive his rights.

4. It constitutes a conditional Bill of Attainder.

The law is well settled, absent an exigency or emergency, all searches of the person and his effects without a Warrant are unreasonable and void and no penalty can attach by reason of the personal exercise of constitutional rights.

See Boyd vs. U.S. 116 U.S. 616. There the Court stated, "It is equivalent to a compulsory production of papers, to make the nonproduction of them a confession of the allegations which it is pretended they will prove."

Here the citizen is automatically guilty if he will not submit to the test and the license is automatically suspended by operation of the law. This is a Bill of Attainder. See Cummings vs. State of Missouri, 4 Wall 377, 71 U.S. 356. See page 363. "These Bills of Attainder may inflict punishment conditionally." The punishment is inflicted conditionally here. If the citizen will submit for a trial he will not be punished, maybe.

See Bell vs. Burson, 91 S. Ct. 1586. A Drivers License is a property right. It cannot be taken away without due process of law. Due process of law contemplates a Judgment and an execution.

The implied consent law does not save the rights of the parties. The Statute does not require that in the event that the citizen is indigent that then the state will prove a physician and an attorney for the prisoner at no expense to the accused. This violates the equal protection of the laws clause of the 14th Amendment. See Griffin v. Illinois 351 US 12, 76 S. Ct. 585, 100 Led 891 (1956). See also Boddie v. Conn. 91 S. Ct. 792 (1971). The Statute must save the rights of the parties or it is unconstitutional. See Gove vs. Murray County, 147 Minn. 24.

The Court erred in holding that the police officer did not have to bring Petitioner before the nearest magistrate to have the question of probable cause determined in advance by a magistrate and to protect the rights of Petitioner.

The officer admitted that he was confronted with no emergency. A magistrate was readily available. Petitioner demanded that he be brought immediately before the nearest magistrate. Under the 1st Amendment Petitioner had a right to Petition his government for a redress of grievances. The 1st Petition that was denied was the oral petition to the Police Officer who had custody of Petitioner. He thereafter denied Petitioner's right to access to the Court and protection of his rights immediately. Justice was delayed and denied.

See Miller vs. U.S. 230 F. 486 at 489 where the Court stated, "The calim and exercise of a Constitutional Right cannot be thus converted into a crime."

See also Simmons vs. U.S. 88 S. Ct. 967 (1968) where it is held, "A citizen does not have to waive or surrender one of his constitutional rights in order to enjoy the exercise and protection of another constitutional rights."

See also Schmerber vs. California, 384 US at 770 where it is stated: "Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned."

See U.S. vs. Lagow, 66 F. Sup 738 Affirmed 159 F. 2d 245, "The general rule is that immunity from unreasonable searches and seizure cannot be waived by anyone except the person whose rights are invaded."

It was also a violation of Petitioner's rights when Petitioner was not taken promptly before the nearest magistrate. This has been the Common law since Magna Charta in 1215. See 5 Am Jur on Arrests Sections 76 and 77.

It was error for the Courts of Minnesota to deny Petitioner his constitutional right to have his friend Gordon Peterson speak for Petitioner in the Courtroom. The State's right to license, regulate and supervise the practice of law cannot obliberate the greater, inherent and inalienable right of Peti-

tioner to peaceably assemble and to petition his government and to have a person of his own choice speak for him. The 1st and 14th Amendments are very specific. The State can pass no law which abridges the right of the people to speak either by themselves or their appointed representative. See California Motor Transport Co. vs. Trucking Unlimited, Jan. 1972, 30 Led. 2d 642. There it is stated: "The right to Petition extends to all departments of the government; and the right of access to the Courts is but one aspect of the right of petition." See also Chandler vs. Fretag, 348 U.S. 3. "Regardless of whether petitioner would be entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified."

See also United Mine Workers vs. Illinois State Bar Association 88 S. Ct. 353, Brotherhood of Railway Trainment vs. Virginia State Bar Association 377 U.S. 1, NAACP vs. Button, 371 U.S. 415, National Savings Bank vs. Ward, 100 U.S. 195.

It is an invasion of the right of privacy to require that a citizen must select his spokesman out of a group who are in effect agents of the government. Also, as in this case, the Bar Association has imposed a minimum fee schedule upon all practicing lawyers, and make it unethical to violate that minimum fee schedule. The licensed lawyers have a monopoly. This conduct on the part of the licensed Bar is in direct violation of the Sherman Antitrust Act.

CONCLUSION

The facts in the case are simple. Daly was arrested in Savage upon the charge of driving under the influence. The officer told Daly that he was taking him for a doctor's examination. He radioed the Sheriff's office. Daly demanded to be taken before the nearest magistrate immediately. Shakopee is 8 miles away. There are at least 7 magistrates in the area available to the officer. The officer admits that he is confronted with no emergency or exigency. He denies Daly's request to be taken before the nearest magistrate. He makes no attempt to obtain a magistrate

over the radio who might be available. The officer conducted a planned or attempted planned warrantless search and seizure pursuant to 169.123.

The law is clear. No amount of probable cause can excuse a warrantless search absence an emergency. Further planned warrantless searches and seizures are outlawed by the 4th and 14th Amendments to the Constitution of the United States. See Coolidge vs. New Hampshire 91 S. Ct. 2041 (1971). See also Boyd vs. U.S. (supra). A penalty cannot be constitutionally imposed by reason of the fact that Defendant refuses to waive his constitutional rights.

Further the Courts of Minnesota have unreasonably interferred with the right of free speech while Petitioner was peaceably assembled and petitioning for a redress of grievances. This is error. The indispensible freedoms secured by the 1st Amendment; freedom of speech, freedom of the press, freedom of association, freedom from fear, freedom of the right to knowledge and the free use thereof, freedom of the right to peaceably assemble and to Petition any department of the government for a redress of grievances; these are given a preferred place, and have a sanctity and sanction not permitting dubious intrusions. See Thomas vs. Collins, 323 U.S. 526. Also Prince vs.

Wherefore, Your Petitioner prays that a Writ of Certiorari be issued by this Court directed to the respondents to certify to the Supreme Court of the United States the complete record in the Supreme Court of Minnesota in file No. 43779 to the end that the Judgment entered on June 7, 1973, be reviewed and reversed by the Supreme Court and for such other relief as may be authorized by law.

Respectfully submitted,

Jerome Daly, Pro Se
Box 1676
St. Paul, Minnesota
55111

STATE OF MINNESOTA

ss

COUNTY OF DAKOTA

Jerome Daly, having been first duly sworn deposes and states that he is Petitioner herein. That he has read and subscribed to the foregoing and that the same is true.

Jerome Daly

Subscribed and sworn to before me this July 2, 1973

Clerk

CHIEF DEPUTY CLERK
COUNTY COURT DIV. 5
[illegible] TRAIL
BURN[illegible] 55378

No. 157 Scott County Per Curiam

Jerome Daly,

Appellant,

43779 vs.

State of Minnesota, Department of Highways, and N. T. Waldor, Commissioner of Highways,

Respondents.

Endorsed
Filed May 18, 1973
John McCarthy,
Clerk
Minnesota Supreme
Court

Considered en banc without oral argument.

OPINION

PER CURIAM.

This appeal challenges an order of the commissioner of public safety revoking a driver's license pursuant to the provisions of the implied-consent law, Minn. St. 169.123. Both the municipal and district courts have affirmed the revocation order. We do also.

Appellant raises a number of issues concerning the constitutionality of the implied-consent law. We reject all of these contentions. (a) The statute, providing as it does for judicial review, meets due process objections. See, Bell vs. Burson, 402 U.S. 535, 29 L. ed. 2d 90, 91 S. Ct. 1586 (1971). (b) The statute does not violate the search and seizure provision of the Fourth Amendment or the self-incrimination provision of the Fifth Amendment. See, Schmerber vs. California, 384 U.S. 757, 86 S. Ct. 1826, 16 L. ed. 2d 908 (1966). (c) Nor does the statute violate the prohibition in U.S. Const. art. 1, Section 10, against bills of attainder. A bill of attainder is a legislative act which inflicts punishment upon a designated person, or easily ascertainable members of a group, for an alleged crime without a judicial trial. United

States vs. Lovett, 328 U.S. 303, 66 S. Ct. 1073, 90 L. ed. 1252 (1946). The revocation of a license under Minn. St. 169.123 is not punishment for a crime. See, Anderson vs. Commissioner of Highways, 267 Minn. 308, 126 N. W. 2d 778 (1964). Further, the license is provided with the right to judicial review. See, Minn. St. 169.123, Subds. 6 and 7. (d) Appellant does not have standing to argue that permitting additional tests denies indigents equal protection of the laws, because there is nothing in the record suggesting that appellant was indigent or financially unable to obtain additional tests. See, Lott vs. Davidson, 261 Minn. 130, 109 N. W. 2d 336 (1961).

Appellant did not, as he claims have a common-law right guaranteed by the law of Minnesota and the Ninth and Fourteenth Amendments to be taken before the nearest magistrate immediately after his arrest. See, State vs. Madison, 281 Minn. 170, 160 N. W. 2d 680 (1968), certiorari denied, 393 U.S. 1102, 89 S. Ct. 904, 21 L. ed. 2d 796 (1969); State vs. Carmichael, 275 Minn. 148, 145 N. W. 2d 554 (1966).

Appellant also contends that the peace officer's instructions concerning his right to additional tests were inadequate. We need not reach this issue since appellant, a former attorney, has admitted that he knew through his legal experience that he had a right to have additional tests.

Appellant's final argument, that he should have been permitted to be represented in court by Mr. Gordon C. Peterson, has no merit. Mr. Peterson is not licensed to practice law in this state.

Affirmed.

FILE COPY

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JEROME DALY,

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vs.

N. T. WALDOR, Commissioner of Highways of Minnesota; JOHN McCARTHY, Clerk of the Supreme Court of Minnesota; and STATE OF MINNESOTA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF FOR RESPONDENTS IN OPPOSITION

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224-7631 — Review Publishing Co., 257 E. 6th St., St. Paul, Minn. 55101 — 224-7631

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Minnesota (Petition, pp. 16-17) is reported at 207 N.W. 2d 541 (Minn. 1973).

The statute involved, the Minnesota "implied consent" law, Minn. Stat. § 169.123 (1969), is set forth in full in the Appendix hereto. The petitioner's petition, erroneously, sets out the provisions of Minn. Stat. § 169.123 (1971), (Petition, pp. 2-6). There are material differences between the 1969 and 1971 versions of subdivisions 1 and 2 of the statute due to amendments to it by the 1971 session of the Minnesota Legislature. The petitioner's driver's license was revoked pursuant to the 1969 version.

QUESTIONS PRESENTED

Does Minnesota's implied consent law violate article one or amendments four, five or fourteen of the United States Constitution?

STATEMENT OF THE CASE

This proceeding was commenced by the petitioner in the state courts of Minnesota to review the proposed revocation of his driver's license, for his alleged failure to submit to a chemical test of his blood after his arrest for "driving under the influence of an alcoholic beverage."

Briefly, the facts leading to this litigation include the following circumstances.

On March 13, 1970, petitioner was apprehended by a member of the Savage, Minnesota, Police Department. The officer had observed petitioner driving a motor vehicle erratically within the Village. After petitioner was stopped, the officer observed petitioner's physical appearance and condition and determined that petitioner was intoxicated. Petitioner was arrested for "driving under the influence of an alcoholic beverage", in alleged violation of Minn. Stat. § 169.121 (1969).

Petitioner, after his arrest, was transported immediately to the county jail in Shakopee, Minnesota, a distance of about eight miles. At the jail, petitioner was requested by the arresting officer to give a sample of blood or urine for testing to determine the alcohol content of his blood. The officer explained to petitioner what the consequences would be for his driver's license should he refuse; the petitioner, then an attor-

ney, was well aware of these consequences. The petitioner chose not to take a chemical test on that occasion.

Subsequently, the Minnesota Commissioner of Highways informed petitioner that his driver's license would be revoked for the refusal to permit a chemical test. The notice of revocation was mailed to petitioner March 23, 1970; on April 13, 1970, a hearing was requested, automatically staying the proposed revocation.

On January 14, 1971, a court trial was held in the Municipal Court of the City of Shakopee, pursuant to Minn. Stat. § 169.123, Subd. 6 (1969). The Municipal Court sustained the order of revocation. On February 10, 1971, the matter was appealed by petitioner to the District Court of Scott County for a *de novo* proceeding.

The District Court, Minnesota's lowest court of general jurisdiction, heard the matter December 8, 1971, in a jury proceeding, pursuant to Minn. Stat. § 169.123, Subd. 7 (1969). Based upon the jury's verdict, the District Court sustained the revocation of petitioner's driver's license. Petitioner thereupon took an appeal to the Minnesota Supreme Court, which also ruled adversely to him, on May 18, 1973. Rehearing was denied on May 31, 1973, and soon thereafter petitioner's driver's license was finally revoked.

ARGUMENT

Implied consent laws similar to Minnesota's presently exist in all fifty states.[1] Nonetheless, the petitioner purports to attack the statute on a number of federal constitutional grounds, alleging that, *inter alia:*

A. The statute is repugnant to the provisions of the fourth amendment to the United States Constitution, as it authorizes an unlawful search for and seizure of evidence;

B. The statute violates the prohibition contained in the fifth amendment to the United States Constitution against compelled self-incrimination;

C. The statute constitutes a bill of attainder, proscribed by Article I, Section 10, of the United States Constitution;

D. The statute denied petitioner due process of law, and equal protection of the laws, in contravention of the fourteenth amendment to the United States Constitution.

These contentions will be considered in turn.[2]

A.

A specimen of blood, or other bodily substance, may be taken incident to a lawful arrest for purposes of analyzing alcohol content consistent with the limitations of the fourth amendment. *Schmerber v. California*, 384 U.S. 757 (1966); *Breithaupt v. Abram*, 352 U.S. 432 (1957).

A mere reading of the Minnesota implied consent statute demonstrates that, in Minnesota, when a driver consents to give a sample of his blood, breath or urine such a sample is taken via a careful and reasonable procedure, unoffensive to dignity. Such tests are volitional and if the driver refuses to

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[1] Implied Consent Legislation, *Law Enforcement Legislative Research Digest* [Compilation No. 6, 1972 edition], International Association of Chiefs of Police, Inc., Gaithersburg, Maryland.

[2] Petitioner presents fourteen alleged arguments against the statute, on pages six and seven of his petition. We have responded only to those which, arguably, merit some discussion.

permit sampling, it is not done. *C.f., Rochin v. California*, 342 U.S. 165 (1952).

For the foregoing reasons, the statute is not repugnant to the fourth amendment.

B.

The protection afforded an accused by the fifth amendment to the United States Constitution applies only to "testimonial utterances." *Miranda v. Arizona*, 384 U.S. 436 (1966). After *Miranda*, this Court determined that an analysis of blood taken from an individual for the purpose of determining its alcohol content was not a "testimonial utterance." See *Schmerber v. California*, 384 U.S. 757 (1966). Thus, petitioner's claim that the Minnesota statute violates the fifth amendment is groundless. Evidence obtained by chemical testing under the statute is no more constitutionally offensive, for fifth amendment purposes, than that obtained by requiring an individual in custody to be fingerprinted or photographed or to give a specimen of handwriting. See the comments of Mr. Chief Justice Burger in *California v. Byers*, 402 U.S. 424, 431-32 (1971).

C.

Petitioner's claim that the implied consent law constitutes a bill of attainder is utterly frivolous. As our Supreme Court said, in its opinion below, "A bill of attainder is a legislative act which inflicts punishment . . . without a judicial trial." It is created only in instances where the legislature, in addition to its legitimate function, exercises the power of the judiciary and, by legislative act, pronounces the guilt of a party, without the safeguards of trial. *Cummings v. Missouri*, 4 Wall. (71 U.S.) 277 (1867).

A person refusing a test, under the Minnesota statute, is entitled to judicial review of any subsequent revocation of his driver's license. Minn. Stat. § 169.123, Subd. 5-7 (1969). In fact, a refusal of the test is permitted if the individual had any "reasonable grounds" to do so. *Id.*, Subd. 6.

There can be no serious or colorable claim that the Minnesota act constitutes a bill of attainder.

D.

We have extreme difficulty discerning in exactly what fashion the Minnesota statute, in petitioner's view, violates the fourteenth amendment. This Court has ruled that a driver's license is an entitlement which may not be terminated without due process of law. *Bell v. Burson*, 402 U.S. 535 (1971). However, Minnesota's statutory scheme clearly provides for full procedural protection before a license may be revoked.

The arguments petitioner raises with respect to a denial of equal protection of the laws were raised below and decided adversely to him. The court, at 207 N.W. 2d 542, held that there was "nothing in the record" to support the equal protection claims. We submit that this view is manifestly correct.

CONCLUSION

The petition, with its numerous disjointed arguments, raises no substantial federal question and should be denied.

Respectfully submitted,

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APPENDIX

Minn. Stat. § 169.123 (1969), in its entirety:

169.123 CHEMICAL TESTS FOR INTOXICATION. Subdivision 1. Peace officer defined. For purposes of Laws 1961, Chapter 454, the term peace officer means a state highway patrol officer or full time police officer of any municipality or county having satisfactorily completed a prescribed course of instruction in a school for instruction of persons in law enforcement conducted by the university of Minnesota or a similar course considered equivalent by the commissioner of public safety.

Subd. 2. Implied consent; conditions; election as to type of test. Any person who drives or operates a motor vehicle upon the public highways of this state shall be deemed to have given consent subject to the provisions of Laws 1961, Chapter 454, to a chemical test of his blood, breath, or urine for the purpose of determining the alcoholic content of his blood. The test shall be administered at the direction of a peace officer, when (1) the officer has reasonable and probable grounds to believe that a person was driving or operating a motor vehicle while said person was under the influence of an alcoholic beverage, and (2) the said person has been lawfully placed under arrest for alleged commission of the said described offense in violation of Minnesota Statutes, Section 169.121, or an ordinance in conformity therewith. No action shall be taken hereunder against the said person unless the two enumerated conditions existed at the time the officer requested the chemical test specimen. Any person may decline to take a direct blood test and elect to take either a breath, or urine test, whichever is available, in lieu thereof, and either a breath or urine test shall be made available to the arrested person who makes such an election. No action shall be taken against the

person for declining to take a direct blood test unless either a breath, or urine test was available. At the time the peace officer requests such chemical test specimen, he shall inform the arrested person that his right to drive may be revoked or denied if he refuses to permit the test and that he has the right to have additional tests made by a person of his own choosing.

Subd. 3. Manner of making test; additional tests. Only a physician, or a medical technician, or registered nurse acting at the request of a peace officer may withdraw blood for the purpose of determining the alcoholic content therein. This limitation shall not apply to the taking of a breath, or urine specimen. The person tested shall have the right to a physician, or a medical technician, or registered nurse of his own choosing administer a chemical test or tests in addition to any administered at the direction of a peace officer; provided, that the additional test specimen on behalf of said person be obtained at the place where such person is in custody and at no expense to the state. Said person shall have the right to immediately communicate with his attorney, doctor or any other person in order to secure a physician, medical technician or registered nurse, for the purpose of administering such additional test or tests; but this shall in no way delay the administering of the test at the direction of the peace officer. The failure or inability to obtain an additional test or tests by a person shall not preclude the admission in evidence of the test taken at the direction of a peace officer unless the additional test was prevented or denied by the peace officer. Upon the request of the person who is tested, full information concerning the test or tests taken at the direction of the peace officer shall be made available to him. The physician, medical technician or registered nurse drawing blood at the request of a peace officer for the purpose of determining alcoholic content

shall in no manner be liable in any civil or criminal action except for negligence in drawing the blood. The person administering such test at the request and direction of such peace officer shall be fully trained in the administration and interpretation of such tests pursuant to standards promulgated by rule by the commissioner of public safety.

Subd. 4. Refusal to permit test; revocation of license. If a person under arrest refuses to permit chemical testing, none shall be given, but the commissioner of public safety, upon the receipt of a certificate of the peace officer that he had reasonable and probable grounds to believe the arrested person had been driving or operating a motor vehicle upon the public highways while under the influence of an alcoholic beverage, and that the person had refused to permit the test, shall revoke his license or permit to drive and any nonresident operating privilege for a period of six months. If the person is a resident without a license or permit to operate a motor vehicle in this state, the commissioner of public safety shall deny to the person the issuance of a license or permit for a period of six months after the date of the alleged violation, subject to review as hereinafter provided.

Subd. 5. Notice of revocation or determination to deny; request for hearing. No revocation under subdivision 4 shall be made until the commissioner of public safety notifies the person by certified or registered mail of the intention to revoke and allows said person a 20 day period after the date of receiving said notice to request of the commissioner of public safety, in writing, a hearing as herein provided. If no request is filed within the 20 day period the commissioner of public safety may then issue an order of revocation. However if a request for hearing is filed, no revocation hereunder shall be made until final judicial determination resulting in an adverse decision to said person.

Subd. 6. Hearing. The hearing shall be before a municipal judge, or probate judge if no municipal judge is available, learned in the law, in the county where the arrest occurred, unless there is agreement that the hearing may be held in some other county. The hearing shall be recorded and proceed as in a criminal matter, without the right of trial by jury, and its scope shall cover the issues of whether the peace officer had reasonable and probable grounds to believe the person was driving or operating a motor vehicle while under the influence of an alcoholic beverage; whether the person was lawfully placed under arrest; whether he refused to permit the test, and if he refused whether he had reasonable grounds for refusing to permit the test; and whether at the time of request for the test the peace officer informed the said person that his right to drive might be revoked or denied if he refused to permit the test and of his right to have additional tests made by a person of his own choosing. The municipal court shall order either that the revocation or denial be rescinded or sustained and refer such order to the commissioner of public safety for his further action.

Subd. 7. Review by district court. If the revocation or denial is sustained, the person whose license or permit to drive, or nonresident operating privilege has been revoked or denied, may within 20 days after notice of the determination by the commissioner of public safety file a petition for a hearing of the matter in the district court in the county where the hearing pursuant to subdivision 6 was held unless there is agreement that the hearing may be held in some other county. The petition shall be filed with the clerk of the said court together with proof of service of a copy thereof on the commissioner of public safety. It shall be the duty of the court to set the matter for hearing on a day certain with reasonable notice

thereof to the parties. The matter shall be heard de novo with a right of trial by jury.

Subd. 8. Notice of action to other states. When it has been finally determined that a nonresident's privilege to operate a motor vehicle in this state has been revoked or denied, the commissioner of public safety shall give information in writing of the action taken to the official in charge of traffic control or public safety of the state of the person's residence and of any state in which he has a license.